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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SAINT LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

v.

MALONE FREIGHT LINES, INC., et al.,
Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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QUESTION PRESENTED

Whether state-law negligence claims alleging a railroad's duty to upgrade traffic control devices at a rail-highway grade crossing are preempted by the Rail Safety Act of 1970 and regulations issued under the Grade Crossing Program of the Highway Safety Act, where it is undisputed that prior to a collision there was an ongoing FHWA-approved project for the installation of traffic control devices in which federal funds were participating?

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR), is a voluntary, non-stock, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's freight railroads, operate approximately 76 per cent of the total line-haul mileage, and produce some 94

per cent of freight revenues. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR. AAR appears before courts, agencies and the Congress on matters of concern to the railroad industry.

Safety at rail-highway grade crossings is a vital concern of AAR and its members, who operate over more than 150,000 miles of track, and over most of the 170,000 rail-highway grade crossings in the United States. Since the enactment of the Federal Rail Safety Act of 1970 and the adoption of the federal Grade Crossing Program,[1] AAR members have actively participated in that program, which has proven to be one of the most successful highway safety measures ever enacted.[2] AAR has a strong interest in maintaining its success, as well as the uniformity and certainty it has engendered.

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*) (FRSA). The federal Grade Crossing Program emanated from a later amendment to the Highway Safety Act, wherein 23 U.S.C. § 130(d) was added. The Secretary of Transportation's role under FRSA and the Highway Safety Act is implemented through the Federal Railroad Administration and the Federal Highway Administration. Therefore, the Secretary will be referred to either as USDOT, FHWA, or FRA.

[2] "The federal Grade Crossing Program has been one of the most successful highway safety programs ever enacted, reducing fatal and non-fatal accident rates by 88% and 62%, respectively, and saving more than 6,400 lives and preventing more than 26,500 ... injuries." Report of the Secretary of Transportation to the United States Congress, *The 1991 Annual Report on Highway Safety Improvement Programs* (April 1991), at IV-5. This dramatic reduction in accidents has continued. USDOT now estimates that more than 7,200 fatalities and 31,000 nonfatal injuries have been prevented. Report of the Secretary of Transportation to the United States Congress, *The 1993 Annual Report on Highway Safety Improvement Programs* (April 1993), at IV-5.

REGULATIONS INVOLVED

23 C.F.R. § 924.5 Policy.

Each State shall develop and implement, on a continuing basis, a highway safety improvement program which has the overall objective of reducing the number and severity of accidents and decreasing the potential for accidents on all highways.

23 C.F.R. § 924.9 Planning.

(a) The planning component of the highway safety improvement program shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience and accident potential;

(3) A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects as defined in 23 U.S.C. 101(a); and

(4) A process for establishing priorities for implementing highway safety improvement projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

(iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,

(iv) Onsite inspection of public grade crossings,

(v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials, and

(vi) Other criteria as appropriate in each State.

(b) In planning a program of safety improvement projects at railroad-highway grade crossings, special emphasis shall be given to the legislative requirement that all public crossings be provided with standard signing.

(c) The planning component of the highway safety program may be financed with funds made available through 23 U.S.C. 402, 307(c), and, where applicable, 104(f).

23 C.F.R. § 924.11 Implementation.

(a) The implementation component of the highway safety improvement program in each State shall include a process for scheduling and implementing safety improvement projects in accordance with (1) the procedures set forth in 23 CFR

part 630, subpart A (Federal-Aid Program Approval and Project Authorization) and (2) the priorities developed in accordance with § 924.9. The States are encouraged to utilize the timesaving procedures incorporated in FHWA directives for the minor type of work normal to highway safety improvement projects.

[subsections (b) - (g) omitted.]

SUMMARY OF ARGUMENT

There are special and important reasons why this case should be reviewed by this Court. In *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732 (1993), this Court held state-law tort claims are preempted under Section 205 of FRSA[3] by regulations issued under the Highway Safety Act[4] which are applicable where federal funds participate in the installation of grade crossing traffic control devices. The decision below involves an important question not reached in *Easterwood* - at what point in a federal highway project does preemption occur? The Petition demonstrates that a clear conflict exists between the decision below and decisions by other United States courts

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[3] 49 U.S.C. § 20106 (original version at 45 U.S.C. § 434).

[4] 23 C.F.R. § 646.214(b), issued pursuant to 23 U.S.C. § 130(d).

of appeals,[5] amply satisfying the criteria governing review on *certiorari* under Rule 10.1(a).

This conflict produces confusion and a serious practical problem of vital concern to railroads, namely the degree to which their legal liability may hinge on the timing of federally funded grade crossing projects. This problem is particularly troublesome in that the states and FHWA control the timing of such projects, including provisions for *interim* safety measures, from their inception to completion.

The ramifications of the decision below on highway safety present an additional consideration of great importance. The decision below runs counter to a basic principle which underlies the federal Grade Crossing Program - - that public safety is best served by a nationally uniform system of improving the most hazardous crossings first. To this end, federal regulations mandate that state agencies set priorities and implement grade crossing improvement projects on the basis of relative hazard rankings under a hazard index formula adopted by the state. These regulations also set forth procedures for expedited completion of projects if deemed necessary.

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[5] The decision below is in direct conflict with *Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071 (10th Cir. 1993), *on remand*, 848 F.Supp. 158 (D.Kan. 1994); and *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 19 F.3d 547 (10th Cir. 1994) (preemption occurs upon significant commitment of federal funds to grade crossing improvement project). It conflicts with the *rationale* of *Shots v. CSX Transportation, Inc.*, 38 F.2d 304 (7th Cir. 1994). The decision below is in agreement with the decision in *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St.3d 259, 631 N.E.2d 607 (Ohio 1994) (preemption occurs when federal funds actually spent, and signals installed and operating).

The decision below undermines the principles embodied in the federal Program by sanctioning collateral attacks on such relative hazard rankings and the timing of improvement projects through state tort law, which relies on *post hoc* inquiries based on subjective negligence standards. The incentives created by this ill-advised approach make it difficult for railroads - - who play an important, though limited role in the federal Program - - to act consistently with the Program's requirements.

ARGUMENT

I.

IMPOSING RESPONSIBILITY ON RAILROADS FOR TIMING FOLLOWING FHWA PROJECT APPROVAL IS INCONGRUOUS WITH THE STATUTE AND FEDERAL PROGRAM

The decisions holding preemption is triggered by FHWA approval of federal funding are in harmony with the statutory scheme of the Federal Highway Act, since FHWA approval marks the birth, or "federalization" of a grade crossing improvement project. FHWA approval constitutes a commitment of federal funds under 23 U.S.C. § 106(a), which provides that such approval is deemed a binding contractual obligation of the United States to reimburse States and railroads for project costs.[6] However, the

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[6] This "deemer" provision was enacted to allow acceleration of projects under the Highway Safety Act. *See, State of Maine v. Goldschmidt*, 494 F.Supp. 93 (D.Me. 1980). Thus, "[o]bligation is the key step because obligated funds are considered 'expended' even though no cash is transferred." *State of Tennessee Ex Rel. Leech v. Dole*, 567 F. Supp. 704, 711 (M.D.Tenn. 1983).

holding below that railroads may, under state law, be responsible, in the absence of a state or FHWA time limit, for project delays following FHWA approval to completion of the project is incongruous with the statute and the Grade Crossing Program regulations, which vest total control over the timing of a project in the states and FHWA.

Projects proceed at a pace dictated by state and FHWA requirements. Typically, state-railroad project agreements contain a provision prohibiting commencement of work until the railroad is notified by the state to do so pending the FHWA approval process. Following approval by FHWA, the state notifies the railroad to proceed. *See, e.g., Thiele v. Norfolk and Western Ry.*, 873 F.Supp. 1240, 1245 (N.D.Ind. 1994). The regulations at 23 C.F.R. §§ 646.218 and 646.219 set forth simplified/alternate procedures for accelerating grade crossing improvements where a project is time-sensitive.[7]

However, the simplified/alternate procedures were not utilized by the state in the case at bar. Instead, the project followed the detailed procedures set forth in 23 C.F.R. § 646.216, which lists numerous requirements prior to approval or implementation of a project. Those provisions preclude, in the absence of FHWA authorization, advertising the physical construction for bidding or

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[7] 23 C.F.R. § 646.218(e) provides that work programmed and authorized under this procedure should include only that which can reasonably be expected to reach the construction stage within one year, and be completed within two years after the initial FHWA authorization date. There can be considerable time savings in this procedure, since 23 C.F.R. 646.218(d) provides that FHWA may authorize construction, including acquisition of warning device materials, with the condition that work at a particular location will not be undertaken until FHWA approves the final plans and specifications.

proceeding with railroad work until certain items have been accomplished in connection with the state's application. In the case at bar, almost a year elapsed between the recommendation of the diagnostic team and FHWA approval of the project. Notwithstanding this delay, neither the state nor FHWA notified the railroad the project was to proceed on an expedited basis, nor did either agency specify a date by which the project was to be completed.

In some cases, projects may be delayed when FHWA authorizes federal funding for pre-engineering work by a railroad in order to obtain complete design and plan drawings prior to its approval of a proposed project. *See, e.g., Hatfield v. Burlington Northern Railroad Co.*, 848 F.Supp. 158 (D.Kan. 1994).[8] These, as well as other delays, result from various requirements of related regulations, which in general restrict federal reimbursements to states for railroad work to "eligible costs," a condition of which is that they be incurred subsequent to the date of FHWA authorization. *See*, 23 C.F.R. § 140.904(b).

Project delay does not end there, since 23 C.F.R. § 924.11 requires that project scheduling and implementation be done in accordance with the priorities adopted by the state under 23 C.F.R. § 924.9, as will be discussed in further detail in the following section.

The decision below creates a serious practical problem for railroads. It exposes them to state-law liability for claims related to the timing of federally funded grade crossing projects, when the preemptive federal regulations

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[8] On remand ordered in *Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071 (10 Cir. 1993).

vest exclusive control over project timing in the states and FHWA.

II.

THE DECISION BELOW RUNS COUNTER TO THE BASIC PRINCIPLE OF SETTING SAFETY DRIVEN PRIORITIES UPON WHICH THE FEDERAL GRADE CROSSING PROGRAM IS BASED

The decision below runs counter to the basic principle which underlies the success of the federal Grade Crossing Program - that public safety is best served by allocating resources to improve the crossings determined to be most hazardous ahead of those determined to be less hazardous. In this regard, 23 C.F.R. § 924.9(a)(4)(iii) is clear in its requirement that state agencies must set priorities and implement grade crossing improvement projects on the basis of relative hazard rankings under a hazard index formula adopted by the state. 23 C.F.R. § 924.11 is equally clear in requiring that the states schedule improvement projects in accordance with the priorities developed under § 924.9. Because of these requirements, a given crossing can neither be planned nor scheduled for improvement until it qualifies on the basis of its relative hazard ranking.[9]

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[9] An illustrative priority hazard indexing system is New Mexico's "5-year plan," discussed in the trial court's decision in *Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 754 F.Supp. 1526, 1529-30 (D.N.Mex. 1990), *rev'd and remanded*, 19 F.3d 547 (10th Cir. 1993), *as modified*, 27 F.3d 481 (10th Cir. 1994). From a master list of grade crossings, those ranked most hazardous are placed on a 5-year improvement list, and when by virtue of its ranking a crossing is the next to be upgraded, the FHWA approval process is begun by the State DOT. For a general overview of Minnesota's similar system, *see*, *McEwen v. Burlington Northern R. Co.*, 494 N.W.2d 313, 315 (Minn.App. 1993).

While each state is free to tailor its own formula to suit its particular needs,[10] significantly, the required use of hazard ranking indexes as the basis for scheduling projects introduced a new approach. The Program abandoned the old concept of determining hazard merely on the basis of prior accidents at a crossing. Instead, the focus was to include an assessment of a crossing's future accident potential: "FHWA considers that reducing the potential for accidents is the most important aspect of the safety improvement program, and has strengthened the wording in the final rule to make this point unquestionably clear." 44 Fed. Reg. 11543 (March 1, 1979), at 11544.

Thus, implicit in every notification by a state agency that FHWA has approved a federally funded grade crossing project is the understanding that the subject crossing has been determined by the state to be less hazardous (*i.e.*, has a lower priority) than those crossings previously scheduled for improvement, and more hazardous than those awaiting scheduling. The Program has the flexibility to change that assumption and can either direct a project be expedited ahead of some or all previously scheduled projects, or can direct *interim* safety measures when necessary.[11]

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[10] States use different hazard indexing formulae, which usually incorporate different factors, or assign different weight to the same factors, depending on considerations of terrain, crossing density, or other factors. The complexities involved in the five formulae in common use by States (*e.g.*, Peabody-Dimmick, New Hampshire Index, NCHRP 50, USDOT Accident Prediction, and Florida DOT Model) are described in USDOT's Rail-Highway Grade Crossing Handbook, (2nd Ed. FHWA-TS-86-215, 1986), Sec. III "Assessment of Crossing Safety and Operation," at pp. 63-78.

[11] Here, the crossing had active devices (flashers) and the diagnostic team recommended they be replaced with larger lenses, which

(continued...)

The decision below, allowing a state-law based collateral attack on the priority to be afforded to an improvement project, forces railroads to make a Hobson's choice - - whether to undertake projects in the order adopted by the state agency, or whether, based on sheer guesswork, to expedite projects at less hazardous crossings ahead of projects at more hazardous crossings. There is no middle ground, for this is a classic "robbing Peter to pay Paul" situation - - for where there are multiple ongoing improvement projects, one cannot be expedited without affecting others. If railroads were to unilaterally divert their engineering resources, materiel or labor to crossings of lower priority, the result is that one or more crossings of higher priority would be delayed. If an accident were to occur at a more dangerous crossing because of that delay, a railroad would be liable for its unilateral departure from the state's priority order, also risking the additional threat of punitive damages for its alleged recklessness for doing so.

Thus, the decision below undermines the principles embodied in the federal program by sanctioning collateral attacks under state tort law on the federally mandated

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[11](...continued)
was done immediately. The state considered, but did not deem warning lights in advance of the crossing to be necessary. An active advance warning sign (AAWS) consists of one or two 8" yellow hazard identification beacons mounted above (or above and below) standard railroad advance warning signs located well in advance of the crossing which begin flashing at, or prior to, the time when the red flashers at the crossing begin flashing. *See*, USDOT Rail-Highway Grade Crossing Handbook, *supra*, at 114-15. Other *interim* measures were suggested at the time for crossings being upgraded from passive to active devices. For example, ¶ 8B-9 of the U.S. DOT Manual For Uniform Traffic Control Devices (1988) (No. FHWA-SA-89-066) authorized "STOP" signs in certain circumstances.

relative hazard rankings. Permitting such attacks jeopardizes the integrity of the program, which is designed to ensure that crossing hazards are determined by state authorities on the basis of a rational system of hazard indexing, and not on the basis of a common law *post hoc* analysis which focuses only upon a single crossing, based on entirely differing standards historically used in determining negligence.

CONCLUSION

On the basis of the foregoing, *amicus curiae* Association of American Railroads respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Eighth Circuit in this case should be granted.

Respectfully submitted,

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